IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 75.

THE JAMES CLARK DISTILLING CO., APPELLANT,
vs.
THE WESTERN MARYLAND RAILWAY COMPANY AND THE STATE OF WEST VIRGINIA, APPELLEES.

No. 76.

THE JAMES CLARK DISTILLING CO., APPELLANT,
vs.
THE AMERICAN EXPRESS COMPANY AND THE STATE OF WEST VIRGINIA, APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

REPLY BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE, [redacted]

W. B. WHEELER,
Of Counsel for the State of West Virginia.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

INDEX OF CASES.

Nos. 75 and 76.

Supreme Court of the United States

October Term, 1916.

The James Clark Distilling Co., Appellant,
vs.
The Western Maryland Railway Company and The State of West Virginia, Appellees.

The James Clark Distilling Co., Appellant,
vs.
The American Express Company and The State of West Virginia, Appellees.

Reply Brief for the State of West Virginia.

STATEMENT OF CASE.

Five briefs have been filed by the appellees since this case was first assigned for hearing in the October Term of 1914, one by Hon. Fred. Blue, and one by the undersigned in 1914; one each by the attorneys for the appellee in the October Term of 1915. Also a brief presented by 15 attorneys general in the October Term of 1915.

We file herewith a reply brief for the State of West Virginia, which we request to have considered in connection with the briefs above mentioned.

The last brief filed for appellant by Mr. Jackson, gives the impression that opposing counsel have lost faith in the efficacy of their argument against the constitutionality of the Webb-Kenyon law, and now confine their claims to the alleged right to ship liquor into prohibition territory for the individual use of the consumer.

FUNDAMENTAL ERROR OF APPELLANT'S ARGUMENT.

The error which is manifest all through appellant's argument is the failure to distinguish between the basic constitutional rights and rights of the appellant which may be prohibited by Congress under authority of the Interstate Commerce clause in the Constitution. In one sense it is true that appellant had a constitutional right, before the passage of the Wilson Act and Webb-Kenyon law, to ship liquor into "dry" territory for the individual use of the consumer or to persons to sell it in the original package, regardless of the laws of the State. This right, however, was not an inherent right; it was predicated on the failure of the proper legislative body to act on this question. This was made manifest in the leading case cited by appellant,—Leisey vs. Hardin, 135 U. S. 108. In that case the Court held that a liquor dealer could, through the channels of interstate commerce, ship intoxicating liquors into a Prohibition State, and the consignee had a right to receive it and sell it in that Prohibition State although the sale in the State was prohibited. The Court also said in the same case:

> The responsibility is upon Congress so far as the regulation of interstate commerce is concerned

> to remove the restriction upon the State in dealing with imported articles of trade within its limits which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

At that time it was claimed that a person had a constitutional right to receive liquor in a Prohibition State, and to sell it there in violation of the law of the State, because Congress had not acted upon this phase of interstate commerce. This decision resulted in the passage of the Wilson Act. The Wilson Act made all intoxicating liquors subject to the laws of the State upon "arrival". This, the Supreme Court in Rhodes vs. Iowa, 170 U. S. 412, very properly construed to mean when the same had come into the hands of the consignee. This gave the liquor dealer a clear right to ship liquor to an individual in Prohibition territory for his own personal use, and, with the characteristic cunning of the liquor interests, they used this means to have liquor put into the hands of bootleggers who would distribute it in the community.

In all of these cases the pronouncement of the Court is predicated not upon the inability of Congress to act, but upon its failure to act. The Court said in the Rahrer case, 140 U. S. 545:

> "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

In other words, Congress has plenary power over interstate commerce. Whenever the State attempted

to control commodities through interstate commerce before Congress had removed from such commodities their interstate character, this Court properly held such law to be unconstitutional.

Keeping this distinction in mind, the case of Vance vs. Vandercook, 170 U. S. 452, is easily distinguished. South Carolina not only did not prohibit the liquor traffic, but was engaged in the liquor traffic as a State, through the dispensary system. A state law attempted to regulate the traffic in intoxicating liquors in interstate commerce requiring a person ordering liquor for his own use to communicate his purpose to the State Chemist.

In the case in question it happened to be a shipment for personal use. But the Court would have necessarily decided the case as it did, even though the liquor was shipped to the consignee and he intended to sell it. As Senator Bacon well said, in the hearing on this proposition in the Senate (61st Cong. Senate Doc. 146, at p. 184.)

> "The Supreme Court in that case was dealing with a case where a man had purchased and had liquor shipped to him for his own use. But there is not a word in that decision which would not have applied with equal force to a man who had it for the purpose of selling it."

This case, therefore, is no authority for the proposition that a person has a constitutional right to have liquor shipped to him for his own use, if Congress decides to so regulate interstate commerce that it is impossible for him to get it for that purpose. This case has been over-quoted, and misconstrued, and can be clearly differentiated from the facts and the law in this hearing.

This Court, as well as other courts, State and Federal, have clearly pointed out the distinction. In State of West Virginia vs. Adams Express Company, 219 Fed. Rep. 802, Judge Wood said with reference to the Vance vs. Vandercook case:

> "It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the State, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances."

It is manifest from the above that the constitutional right of a liquor dealer to ship liquor into "dry" territory and have it sold in the original package was prohibited by the Wilson law. The decisions construing this law are ample authority for the Webb-Kenyon law which proposed to take away from a citizen of a State the right which he had under the Wilson law; namely, to have liquor shipped for his own personal use regardless of the law of such State preventing it.

The whole history of the effort to secure the Webb-Kenyon law, the evil which it attempted to remedy and the practically uniform construction of the courts of it, show clearly its purpose. It intended to and does remove from the agency of interstate commerce all intoxicating liquor which is to be *"received, possessed, sold or used in violation of any laws of the State"*. Congress properly decided that it was a wrong policy to allow the Federal Government to aid lawbreakers in nullifying the laws of the State restricting and prohibiting the liquor traffic. This Court in deciding the case of Adams Express Company vs. Commonwealth of Kentucky, 238 U. S. 199, well said:

> "From what we have said, it follows that, before the passage of the Webb-Kenyon Act, while the state in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the State. The history of the Webb-Kenyon Act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook, in the passage of that Act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the state by means of interstate commerce, in certain cases."

That Congress has power to thus regulate interstate commerce is shown by the authorities in the brief in which we have filed in this case, (See pages 8 to 22) and in the brief filed by the Attorneys General of thirteen States (pp. 10-29 inclusive).

In fact, one of the cases relied on by appellants in their first brief, the Bowman case, 125 U. S. 465, is authority for this proposition:

> "The state cannot exclude an article from commerce and consequently from importation simply by declaring that its policy requires such exclusion; AND YET ITS REGULATIONS RESPECTING THE POSSESSION, USE AND SALE OF ANY ARTICLE OF COMMERCE MAY BE AS MINUTE AND STRICT AS REQUIRED BY THE NATURE OF THE ARTICLE AND THE LIABILITY OF INJURY FROM IT TO THE SAFETY, HEALTH AND MORALS OF ITS PEOPLE."

This case, decided before the passage of either the Wilson or the Webb-Kenyon Acts, shows clearly what the Court would have held if Congress had taken the articles in question out of the channels of interstate commerce. The Congress has removed the obstacle preventing the enforcement of the prohibitory laws in the States. The States may now get the benefit of those laws which they have authority to enact but heretofore unfortunately did not have power to enforce. Such an anomaly never should have existed in a government whose fundamental purpose is to promote the general welfare. Now that the obstacle has been removed we cannot believe that it is in the function of this Court to replace it by judicial construction.

CASES DECIDED SINCE APPELLEE FILED LAST BRIEF.

Up to the time of the filing of the last brief, every State Supreme Court, Federal, Circuit Court of Appeals and all of the upper courts had sustained the constitutionality of the Webb-Kenyon law. The decisions since that time have assumed the constitutionality of the law and have given more or less of attention to the construction placed upon state laws.

WASHINGTON CASES.

In the case of The State of Washington vs. John C. Eden, decided July 5, 1916, the Court held that the law relating to the unlawful possession of intoxicating liquor applied only to liquors acquired after the act became effective. As the Court said:

> "Under admitted facts in this case, the possession of liquor was lawfully acquired. It was lawfully held prior to the taking effect of this act."

This same Court in a former decision expressed its opinion on the Webb-Kenyon law, upholding the constitutionality of the act. Gottstein vs. Lister, 153 Pac. 595.

Upon the petition for a rehearing in this case the Supreme Court on August 18th, held:

> "All of the provisions of the law are preserved and offenders are still subject to prosecution to the same extent and for the same causes now as at any time since the law became effective."

The only question involved in this case is whether liquors secured before the law went into effect and kept for private use were subject to seizure. The court held there was no violation of the law. That in fact the law permitted it.

ARIZONA.

In the case of Sturgeon vs. State, the Supreme Court of Arizona held there was no valid state statute which had been violated by the shipment of liquor into the State for personal use. The Court made it clear, however, that the State of Arizona could pass a law prohibiting the possession of liquor and when the State had done so, such shipments would be denied the privilege of interstate commerce. 15-4 Pac 105-0.

MISSOURI.

The Supreme Court of Missouri held in the case of State vs. Mo. P. R. R. Co., 152 Pac. Rep. 777:

> "That Congress has power to remove from the protection of the interstate commerce clause intoxicating liquors intended to be used in violation of state law."

SOUTH CAROLINA.

The Supreme Court of South Carolina, November Term, 1915, sustained the constitutionality of the Webb-Kenyon Act, with Justice Watts dissenting from the opinion. In the case of Brennan vs. Southern Express Company, the Court held:

> "The constitutionality of the Webb-Kenyon act is attacked on the ground, as alleged, that it attempts to confer upon the States the power to regulate interstate commerce,—a power that was conferred by the Constitution upon Congress, and, therefore, one which Congress alone can exercise. The Title of the act is: 'An Act divesting intoxicating liquors of their interstate character in certain cases.' Its pertinent provisions are in substance: 'That the shipment or transportation of any intoxicating liquor from one State into any other State, which said liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used in violation of any law of such state, is prohibited.' There is nothing in the title or body of the Act upon which the attack can be sustained. The regulation is made by Congress itself in excluding from interstate commerce liquor that is intended to be received, possessed, sold or used in violation of any State law.
>
> The power to regulate commerce includes by necessary inference the power to exclude, absolutely or conditionally, from its operations injurious things and pernicious practices, and that has been done by Congress in numerous instances, which have been sustained by the Supreme Court. Champion vs. Ames, 130 U. S. 321 (lottery tickets); Hipolite Egg Co. vs. United States, 220 U. S. 45 (adulterated foods and drugs); Hoke vs. United States, 227 U. S. 308 (white slave traffic).

The Wilson Act, which was of similar though less extended effect, was attacked on the same ground. It provided that liquors transported in interstate commerce should be subject to the law of the States upon arrival therein. In Rahrer's case, 140 U. S. 545, the Supreme Court affirmed its constitutionality as a valid exercise by Congress itself of the power to regulate commerce. In respect of being a regulation of commerce by Congress itself, it would be difficult to draw a distinction between the two Acts. . . . This brings us to the next question: Has the State power to regulate and control the personal use of intoxicating liquor by its citizens? Or, conversely stated, has the citizen the constitutional right to import liquor in unlimited quantities for personal use? The history of legislation on the liquor traffic in this and other countries abundantly shows that the power to make laws regulating or prohibiting the liquor traffic has been assumed to exist in every sovereign state, and that it has been exercised in many different ways, with the highest judicial sanction. It is true, until comparatively recent years, such legislation has been directed principally to the regulation or prohibition of sales of intoxicants. But it might have been directed to the regulation or prohibition of purchase, or it might have been made to apply to both seller and buyer. But this circumstance should not lead us from the true conception of the ultimate purpose of such laws, for certainly there is no vice in or harm that can result from the mere sale of liquors. The mischief comes of its use or abuse. The real purpose, therefore, of such legislation, except where it is solely for revenue, is to limit and control personal consumption. Such laws are founded upon the belief, which is very general, if not universal, that the unrestricted use of intoxicants is detrimental, not only to the user, but also to his family, and both directly and indirectly in many ways to the

state. The truth is, whether it be admitted or not, that liquor is the cause of many evils. It wrecks and ruins many lives, it causes much unhappiness in the homes of our people, corruption in our politics and degradation and vice and pauperism and crime. Is the social body so sorely afflicted helpless? Has the state no power to rid society of at least some of the injurious results of its use and the traffic in it?

"It has been frequently held that the State cannot, by contract or otherwise, divest itself of that undefined and undefinable power of sovereignty called the police power—the power to protect its citizens and itself, the only reason for the State's existence. This power extends to all the great public needs. Camfield vs. United States, 167 U. S. 518, 'It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare'. Noble State Bank vs. Haskell, 219 U. S. 104. That it may be exerted arbitrarily or tyranically is denied. But that it may be reasonably exerted for the protection of society against all forms of evil, for the protection of men against the greed, avarice and other devices of each other, and even for the protection of men against themselves—against their own weakness and follies—is sustained by the highest reason and judicial authority. . . .

"It is true, as we have seen, that Congress has the power to exclude intoxicating liquors from interstate commerce, and the state the power to prohibit the manufacture and sale of it, even for personal use, what becomes of the alleged constitutional right of the citizen to obtain and drink it at his pleasure? The logical answer is that he has no such right. As said by Mr. Justice Harlan for the Court in Champion vs. Ames, 'If at the time of the passage of the act of 1890 (the Wilson

Act) all the states have enacted laws prohibiting the sale of intoxicating liquors within their respective limits, then the act would have had the necessary effect to exclude ardent spirits altogether from commerce among the states.'

"The conclusion is inevitable that the power to regulate and control the personal use of intoxicating liquor by the citizens rests with the law making body of the State—the Legislature. If the power be abused as all power to be exercised with discretion and judgment may be, the remedy is with the people. They are the source from which it is derived. But so long as the exertion of power bears a reasonable relation to a legitimate purpose sought to be accomplished, the courts may not interfere. With the wisdom and policy of legislative enactments, they have no concern. Being forbidden by the Constitution to invade the legislative domain, they cannot substitute their judgment and discretion for that of the law makers.

" 'No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare.' Mugler vs. Kansas. Upon this principle it is held that the sale, and even the possession of things harmless in themselves may be prohibited, as a means to the accomplishment of an ulterior valid purpose. In Purity Extract Co. vs. Lynch, 226 U. S. 192, a statute of Mississippi, prohibiting the sale of a non-intoxicating malt liquor, was sustained. The Court said: 'That the state in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. Bartemeyer vs. Iowa, 18 Wall. 129; Boston Beer Company vs. Massachusetts, 97 U. S. 25; Mugler vs. Kansas, 123 U. S. 623; Kidd vs. Pearson, 128 U. S. 1; Crowley vs. Christensen, 137 U. S. 86. It is also well established that, when a state exerting its recognized authority undertakes to suppress what it is free

to regard as a public evil, it may adopt such measures having reasonable relation to that end, as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth vs. Illinois, 184 U. S. 425; Otis vs. Parker, 187 U. S. 606; Ah Sin vs. Wittman, 198 U. S. 500-504; New York ex rel. Silz vs. Hesterberg, 211 U. S. 31; Murphy vs. California, 225 U. S. 523. With the wisdom of the exercise of that judgment the Court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature, a notion foreign to our constitutional system. In New York vs. Hesterberg, 211 U. S. 31 it was held to be within the police power of the state to prohibit the possession of game during the closed season, even if it was brought from without the state.

"As the legislature, in its wisdom, has by the Act of February 20, 1915, in effect declared that the unrestricted personal use of intoxicating liquors is detrimental to the public welfare, and that the receipt and having in possession of unlimited quantities of such liquors by the citizens tends to hinder and defeat the enforcement of the law against the sale thereof, and as that conclusion is based upon reasonable grounds, we must hold that the Legislature has not exceeded the limit of its power. The individual citizen must submit to reasonable restraints and inconvenience to promote the common good. *Suprema lex est salus populi.*

> "The judgment of the Circuit Court must be modified to conform to the views herein announced."

The case of Seaboard Air Line Railway vs. Kenney, decided by the United States Supreme Court April 3rd, 1916, 60 Law Ed. 458, Advance Op. No. 12, issued under date of May 15th, 1916, throws light on the questions involved:

> "The 'next of kin' for whose benefit an action under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149) as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143) Comp. Stat. 1913 Sec. 8662), may be maintained to recover damages for the negligent killing of their intestate by his interstate railway employer, are those who are next to kin under the local law."

This act of Congress has for its constitutional sanction the commerce clause of the United States Constitution.

It has been held to be a valid and constitutional exercise of the legislative authority vested in Congress.

It creates a right of action and prescribes the manner and persons for whose benefit it may be enforced.

In doing that, as shown by the holding in the case cited, it recognizes the statutes of the various states as to who are next to kin. This "next to kin" may be and in fact is different in a number of the states.

If Congress may pass a law which depends for its vitality upon the law of the states in determining who are next of kin, then why cannot Congress pass a law taking liquors out of interstate commerce which are outlawed in the states?

The Court went much further in the above case than it is necessary for it to go in the case now under consideration.

REPLY TO THE CONSTRUCTION PLACED BY APPELLANTS ON THE WEBB-KENYON ACT.

On page 3 of Appellants' Brief they say:

> "Now if the Webb-Kenyon bill did not divest intoxicating liquors of their interstate character, except in certain cases as stated by the title of the Act, I would like to inquire as to what cases it does not divest liquor of its interstate character, if the contention of the Defendant in Error in this case be true. Under the West Virginia law no shipments of liquor of any kind can be made into the State of West Virginia."

Evidently appellants have not read carefully the laws of the State of West Virginia. Section 34 of the law passed at the Extraordinary Session in 1915, provides:

> "That druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections 4 to 24."

A druggist may have certain liquors shipped to him and he may sell them for legitimate purposes. The State's policy is to discourage and prevent the use of intoxicating liquor as a beverage. In order to carry out this policy ample means were provided for shipment and sale of liquor for medicinal, mechanical and other legitimate purposes, and to prevent in every way

possible the means of securing it for beverage purposes.

The Legislature of West Virginia keeping step with advancing and enlightened public sentiment *have* gradually limited the means by which liquor may be secured for beverage purposes. It is not for judicial review whether they made an error in judgment in not prohibiting an individual from carrying a specified amount of liquor with him under regulations provided in the law. The legislature evidently did not consider this a source of any great danger. They did consider it a great menace to their adopted policy of Prohibition to have it distributed generally by common carriers. They prevented this source of evil in the only legal way to do it, namely, prohibited the reception or possession of liquor by the citizens of West Virginia from such carriers. The classification and the degree of the evil sought to be remedied justified the distinction made. (See p. 76 of original brief).

Appellants claim on page 4 of their brief that someone has referred to the Webb-Kenyou Bill as an addendum to the Wilson Bill, and that no one claimed under the Wilson Bill that you could interfere with shipments of liquor for the use of the individual.

The purpose of the Webb-Kenyon Bill was to remedy the defect pointed out by appellants in the Wilson Bill, and instead of being an argument against the construction for which we contend for the Webb-Kenyon Bill, it is one of the best reasons for sustaining our contention. Evidently this Court was of the same opinion, for the reasons set forth, *supra.*

On page 6 appellants claim that the Webb-Kenyon law deals simply with the "shipment and transportation of liquor." The Act is clear on this point: it

deals with the shipment and transportation of liquor to be "received, possessed, sold or used in violation of any of the laws of the State", and any act which is incidental to or aids any such unlawful shipment may also be prohibited. We have fully set forth the reasons for this proposition on pages 78 to 79 of our original brief. See, also, pages 9 to 15 of brief filed by Fred O. Blue.

On page 8 of appellant's brief they say, "Nowhere has it ever been doubted that an individual had the right to eat and drink whatever he pleased so long as he did not exercise this right in a way to be harmful to the community at large."

The Supreme Court answered this fallacy years ago by the following decision, 137 U. S. 86:

> "There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury it is true falls upon him in his health, which the habit undermines, in his morals, which it weakens, and in the abasement which it creates. But as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."

Appellant's reference to the prohibition of drinking of coffee, etc. is wide of the mark. When the drinking of coffee injures those who drink it, making many of them drunkards, criminals, paupers and delinquents, then Congress and the State Legislatures will be justified in making drastic laws to further restrict and prohibit the use of coffee. Any business or act which is a menace to the general welfare may be prohibited. No person in civilized and orderly government has any

inherent right to continue in a business, or a practice, which destroys the general welfare. Many of the laws shortening hours of labor and making working conditions safe are sustained on the same basis as a legislation against the liquor traffic. The health and morals of the people are essential to the perpetuity of the Government. Legislation which makes working conditions safe and helpful not only help the individual who works, but his offspring, and promotes the general welfare by creating conditions which encourage temperance and sobriety. The relation of excessive fatigue through long hours of labor and its effect on morals, health and temperance, has been set forth in an exhaustive and able brief prepared in part by His Honor Justice Brandeis, before he became a member of this Court. The whole trend of civilization by legislative act and judicial interpretation is to safeguard the public health and public morals.

That the liquor traffic is a menace to them has been proven by the records of every court, by the inmates of our state institutions for criminals, delinquents and the human wreckage of society. (See pages 6-22 to 29, brief, filed in cases 383 and 383, 1915.)

On pages 9 and 10, appellants claim that the Webb-Kenyon law did not give the State power over interstate commerce of liquor except in cases where it was to be used illegally. This is not the wording of the statute, it is:

> " . . . to be received, possessed, sold or in any manner used . . . in violation of any law of such State."

Appellants make a violent assumption in stating that "it was never the intention to prevent the in-

dividual from securing shipments of liquor for his personal use". On pages 37 to 40 of our original brief, we have shown that the purpose of all this legislation restricting or prohibiting the liquor traffic is to discourage and prevent the use of liquor as a beverage.

PURPOSE OF WEBB-KENYON LAW AS SHOWN BY ITS AUTHORS AND ADVOCATES.

This court has already stated the rule for determining the purpose of the Act in the case of Adams Express Company vs. Kentucky, 238 U. S., page 190

> "It would be difficult to form language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the State operative only where the liquor is to be dealt with in violation of the liquor law of the state into which it is thus shipped or transported."

The law itself is clear and the language is definite and certain. Any statement from the Congressional Record can be of but little if any service.

Appellant sets forth at length the statement of Senator Kenyon as to the purpose of the Webb-Kenyon Act. He also refers to statements from Dr. Dinwiddie. He claims that the statements of these sponsors for the measure show that it was never intended that the states should prohibit the use of liquor or make it impossible to secure liquor for personal use. This misunderstanding on the part of appellant arises out of the fact that the discussion turned on the purpose of the Webb-Kenyon law. This act did not prohibit the shipment of liquor to an individual for personal use

or for any other use, it simply took out of interstate commerce all liquors shipped into the State which were intended to be received, possessed, sold or used in violation of the laws of the State. Senator Kenyon stated the proposition clearly when he said:

> "If liquors are shipped with the intent of being used by the person for his own personal use and in no way to violate the law of the state, then they are subjects of commerce."

Any statement made in the heat of the debate as to what the people of the State might properly do, can be of little if any value in reaching a proper construction of this law.

Dr. Dinwiddie's interpretation of this law is concisely set forth on page 26, serial No. 1, in hearing before the Committee on the Judiciary on the Webb Bill No. 6293. He said:

> "Our position is that the Congress of the United States ought to take the position of permitting the State to give full force and effect to the laws of the state. That is our whole contention. The bill of itself interferes with no man's right to import intoxicating liquors for the purpose of personal consumption. That question, in my judgment, is not involved here and it ought not to be raised here. If the state proposes to try that, and if it can be constitutionally done—if the State proposes to interfere with the personal use of intoxicating liquors, that is an entirely different proposition and under the control of the state. My position is that we do not, by these bills, raise any such question here. The state ought to have the right to do what it pleases in the operation of its police powers absolutely untrammeled by outside influences, and these men who are so anxious to

> safeguard the personal liberties of the citizens of the State have full redress, because they can go into the legislatures of the states and work against the adoption of such laws, or they can work with the electorate of their States to prevent the election of legislators who would support such laws. The idea here is that the Congress of the United States should forbid the use of the instrumentalities of interstate commerce, which it exclusively controls, for the purpose of violating the laws of the state, and I am ready to defend that proposition anywhere in this country."

That any shipment of liquor into a state to be there received or possessed in violation of the laws of the state would be prohibited, is also made clear by Hon. Fred. Caldwell who had more to do with the drafting of the Webb-Kenyon law than any other person. At the hearing on interstate shipment of intoxicating liquor, Sen. Doc. 488, 62nd Cong., 2nd Sess., on the Kenyon Bill, No. 4043, at page 25, we find the following:

> "Mr. Maxwell. Would you mind telling us what is the significance of this expression: 'Which is intended by any person interested therein, directly or indirectly, or in any manner connected with the transaction'? What is all that intended to cover?
>
> "Mr. Caldwell. All features of interstate commerce and commerce in intoxicating liquors. If there is a loop hole for them to get out through, I did not know it at the time I drew that bill. (Laughter)."

Counsel for appellant in this case had no difficulty in determining the purpose of the measure from the person who drafted it. It was understood generally by those both inside and outside of the Congress. This

intention is further made clear by the statement of Mr. Webb, now Chairman of the House Judiciary Committee, who made clear his idea of the Webb-Kenyon Act, on February 8, 1913:

> "If the states have the right, in the first place, to prohibit the personal use or receipt of liquor, this Congress has no power to take that right away from the states. On the other hand, if the state has no power under its own Constitution or the Constitution of the United States to deprive a man of the right of the personal use of liquor, then this law is harmless as to such right, because the state can never take that right from him."

This same purpose was made manifest by the action of both House and Senate defeating amendments which would accomplish what appellant claims to be the purpose of the act. On February 10th, 1913, Congressional Record, Senate, 62nd Congress, 2nd Session, part 3, at pages 2922 and 2923, Mr. O'Gorman offered the following amendment:

> "But nothing in this act shall be construed to forbid the interstate shipment of liquors herein defined into any state, territory or district where the same are intended for sacramental purposes or for the personal use of the owner or consignee thereof or for the members of his family."

This amendment was lost. Two amendments in the House were offered, one by Mr. Bartlett of Georgia and one by Mr. Davis of West Virginia to accomplish a similar purpose. Both were voted down. Both House and Senate clearly understood that the state might enact a law prohibiting any phase of the liquor traffic even to the reception or possession of liquor and

it would be unlawful to use the channels of interstate commerce to bring liquor into such state in violation of these laws. The purpose of the act is made clear by the wording of the Act. This, of course, will determine its construction. The overwhelming testimony of the sponsors and champions of the measure affirms the construction for which we contend.

An anomalous proposition is set forth on page 10 of appellant's brief, which says: "Under the present condition of affairs, it is absolutely impossible for a dealer to do business without making himself liable to criminal prosecution in many of the states."

By what right, may we ask, has a liquor dealer in Cincinnati, New York, or Baltimore, to do business in a state where the people have prohibited the liquor traffic and the possession or reception of liquor for beverage purposes? The intent of these laws was to make it impossible for these liquor dealers to do business in prohibition territory and to punish them if they attempted to do so. It is this arrogant, law-defying spirit on the part of the liquor interests which has made it necessary to enact many of the laws of which they now complain. These laws are intended to be enforced and are being enforced, and this is the reason why appellant's clients are making such a vigorous fight against the enactment of this act which makes law-enforcement possible. As the Supreme Court of Kansas well said in the decision quoted *supra,* there is no greater champion of constitutional rights than a liquor dealer when he has been brought before a court of justice for violating the laws of the State enacted for the public good.

On page 12 a lengthy quotation is set forth in the case of American Express Company vs. Iowa, 196 U. S.

133. This case is no authority for appellant's contention. It was decided before the passage of the Webb-Kenyon Act and simply holds that:

> "Intoxicating liquors shipped C. O. D. from one State into another state cannot be subjected to seizure under the laws of the latter state, while in the hands of the Express Company, without infringing the commerce clause of the Federal Constitution."

There can be no question about the soundness of this proposition under the laws as they existed at that time. But conditions have changed since then. New laws have been enacted and the decision does not apply.

Appellants contend on page 13 of their brief that "Intoxicating liquor has always been recognized as a fit subject of commerce."

This proves nothing: Lottery tickets were always recognized as a fit subject for interstate commerce until they were prohibited. Nearly every prohibited act is recognized as lawful until it is declared unlawful by the proper legislative body. As heretofore set forth in our first brief in this case, the people have an inherent right to better their conditions in any unit of government, small or large, when the legally constituted majority desire to do so, in the manner provided by the organic law. The courts have repeatedly held that those engaged in the liquor traffic have no inherent right to be so engaged, and they cannot complain if the traffic is abolished root and branch in a State or in the Nation. There is as little basis for their contention in this regard as in the following statement on page 13, "while it may be true that Congress may absolutely

forbid the sale or manufacture of liquor, it has not undertaken to do so, etc."

We would be very glad indeed if counsel for the liquor interests would cite the provision in the Constitution which gives Congress the right to prohibit the manufacture and sale of liquor. If Congress had such right, the present conflict which is now pending—to amend the Constitution to prohibit the liquor traffic—could be averted.

We challenge the truth of appellant's statement on page 16 of their brief, namely, that there is more "moonshine and illicit distilling going on in the southern states today than ever before in the history of the country."

The Government records disprove this statement; but if it were true, it would only be an added argument for additional legislation to deal with the law-breaking business.

We have also set forth the facts on page 62 of our original brief, which show the incorrectness of another statement on page 16 of appellant's brief, to-wit., "The Internal Revenue records show that the consumption of liquor is still as great as it ever was, even in proportion to the population."

The facts are, there was a decrease of the sale and consumption of malt and distilled liquors in 1915, of over 215 million gallons. That meant a decrease in per capita consumption of over 2 gallons,—the largest decrease in the history of the country. Even the liquor dealers are waking up to the fact that prohibition laws can be enforced when Federal interference has been removed by Congress.

The specious plea of appellants "that an article recognized from time immemorial as an article of com-

merce cannot be kicked around like a football in this outrageous manner", should be addressed to the State Legislatures and to Congress, and not to the Court.

In fact every argument which genius can devise has been addressed to these legislative bodies. The claims and arguments of the liquor dealers have been weighed and found wanting. Advancing civilization has come to the point where it is too good to tolerate the beverage liquor traffic much longer. Every liquor dealer in the United States went into the liquor business knowing that the people had the right to prohibit the traffic, and he assumed that risk in engaging in this business which produces crime and misery in society. Science, industry, fraternal organizations, public health departments, life extension societies, and every agency for human uplift, has raised a hand against the beverage traffic. The legislative department of government to which is entrusted the right to determine questions of public policy relating to evils, have acted in response to the public sentiment and enlightened public conscience of the people, and it is not for the judicial department of government to set aside their actions.

W. B. Wheeler,
Of Counsel for the State
of West Virginia.